Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

92-1321

No.

In The

Supreme Court of the United States

October Term, 1992

DAVID T. McCAW,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

ROBERT G. BAUER
ABRAHAM, PRESSMAN & BAUER, P.C.
Attorneys for Petitioner
1818 Market Street
35th Floor
Philadelphia, Pennsylvania 19103
(215) 569-9990

3176
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Are a criminal defendant's constitutional rights to confrontation and due process violated where all alleged drug contraband is destroyed without notification to defendant, by the prosecution prior to trial?

2. Where the prosecution fails to follow state statutory procedure in destroying all alleged drug contraband prior to trial does this constitute prosecutorial bad faith and a denial of constitutional due process?

3. Has the requirement for bad faith conduct under *Arizona v. Youngblood* been met where the prosecution has failed to notify the defendant of the destruction of all alleged drug contraband pursuant to a discovery request and does not reveal the destruction until mid-trial?

PARTIES TO THE PROCEEDING

The parties in the Supreme Court of the Commonwealth of Pennsylvania were the petitioner, David T. McCaw and the respondent, the Commonwealth of Pennsylvania (hereinafter "the Commonwealth").

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinion Below	1
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	9
I. David McCaw's confrontation and due process rights were denied as the alleged evidence was destroyed.	9
II. The Commonwealth's conduct constitutes bad faith under *Arizona v. Youngblood.*	13
Conclusion	16

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Arizona v. Youngblood, 488 U.S. 451 (1988) .....i, 13, 14, 15

Brady v. Maryland, 373 U.S. 83 (1963) 10, 11, 13, 14

United States v. Agurs, 426 U.S. 97 (1976) 11, 12, 13, 14

Statutes Cited:

28 U.S.C. § 1257(a) 2

35 P.S. § 828 ..... 2, 9

35 P.S. § 829 ..... 2, 9

Rule Cited:

Pennsylvania Rule of Criminal Procedure 305 ..... 3, 4

APPENDIX

Appendix A — Order of the Supreme Court of Pennsylvania Middle District Dated December 1, 1992 ..... 1a

Appendix B — Judgment and Opinion of the Superior Court of Pennsylvania Dated December 9, 1991 ..... 3a

Appendix C — Memorandum Opinion of the Court of Common Pleas of Berks County, Pennsylvania Criminal Division 17a

No.

In The

Supreme Court of the United States

October Term, 1992

DAVID T. McCAW,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

The petitioner David T. McCaw respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania affirming the opinion of the Superior Court of Pennsylvania on November 23, 1992.

OPINION BELOW

The opinion of the Court of Common Pleas of Berks County, Pennsylvania was unreported (Appendix, *infra* at 17a). The matter was appealed, heard in the Superior Court of Pennsylvania which affirmed the decision of the Court of Common Pleas. The Superior

Court opinion has not been reported (3a). The decision of the Superior Court was appealed to the Supreme Court of Pennsylvania which affirmed the Superior Court, per curiam, by order without an opinion (1a).

STATEMENT OF JURISDICTION

An order of the Supreme Court of Pennsylvania was entered on November 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

35 P.S. § 828 of the Controlled Substance, Drug, Device and Cosmetic Act states:

> § 828. Confiscation of Drugs offered in Evidence
>
> All drugs offered in evidence in the trial of any cause in this Commonwealth involving illegal sale or possession of such drugs, shall be confiscated by the district attorney of the county in which said trial takes place.

35 P. S. § 829 of the Controlled Substance, Drug, Device and Domestic Act states:

> § 829. Disposition of Confiscated Drugs
>
> The district attorney of the County of the Commonwealth, who shall thus confiscate such drugs, is hereby authorized to deliver such drugs to the State Department of Health or to any other legally constituted health board of

> any county of the Commonwealth, as in his discretion he may deem fit.

Pennsylvania Rule of Criminal Procedure, Rule 305, 42 Pa.C.S.A. provides in pertinent part:

> Rule 305 Pretrial discovery and inspection
>
> B. Disclosure by the Commonwealth
>
> (1) Mandatory: In all court cases, on request by the defendant and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.
>
> (a) Any evidence favorable to the accused which is material to guilt or punishment, and which is in the possession or control of the attorney for the commonwealth;
>
> (f) any tangible objects, including documents, photographs, fingerprints or other tangible evidence.

STATEMENT OF THE CASE

On or about August 26, 1988, David T. McCaw was arrested by the Cumru Township Police Department of Berks County,

Pennsylvania. The arrest was pursuant to a search warrant obtained by police based upon statements made to them by an alleged eyewitness, Randy Fisher. Although police reported that they had seized several different items of drug contraband and evidence from David T. McCaw's workplace, at the trial of this matter no items of tangible evidence were produced by the prosecution. Instead only a photograph of a small plastic packet appearing to contain a white substance alleged to be cocaine alongside a shirt with the name "Dave" on it was produced by the District Attorney. This photograph was admitted into evidence by the trial court over objection by counsel for defendant. The eyewitness, Randy Fisher, whose statement had formed the basis for the search warrant, was listed as a trial witness by the District Attorney in a pretrial document, however, Mr. Fisher was not produced to testify at trial by the prosecution nor were his whereabouts known nor disclosed by the District Attorney.

On November 16, 1989, David T. McCaw's defense counsel entered his appearance in the criminal case in which the petitioner was the defendant. On November 17, 1989, counsel forwarded to the Berks County District Attorney's office his request for discovery under Pennsylvania Rule of Criminal Procedure 305. Simultaneously with his entry of appearance, defense counsel filed with the Berks County Court of Common Pleas an omnibus pretrial motion for relief wherein it was alleged that the Commonwealth was in possession of evidence (*i.e.*, the alleged contraband and shirt) that was material to the case. The prosecution transmitted to defense counsel a single document which listed the Commonwealth witnesses against the defendant and which listed Randy Fisher as a witness for the Commonwealth.

On February 13, 1990, defense counsel filed a motion to dismiss the charges against David T. McCaw. On February 14, 1990, Judge Calvin Smith, of the Berks County Court of Common Pleas, denied the motion to dismiss, *sua sponte*, without a hearing.

At no time before or after this order was there any notice from the prosecution that the alleged controlled substance had been destroyed or that the evidence was not in the possession of the District Attorney.

On May 15, 1990, the trial, for which this petition is filed, was commenced before Judge Smith. Immediately prior to trial on that same day, Judge Smith heard testimony and argument on the previously filed pre-trial omnibus motion. There was still no mention made of the fact that the arresting officer, Detective Kellett, had destroyed the evidence. Judge Smith denied the defendant's motion.

In the middle of the trial, it was revealed for the first time that the prosecution was not in possession of any of the evidence alleged to have been seized at David T. McCaw's place of business. Even though defense counsel had made a timely request for discovery, this information was withheld. Instead, the Commonwealth produced only a staged photograph showing a shirt which it alleged to belong to the "defendant" as well as a packet of white powder found in the shirt which it alleged to be cocaine.

At the trial, on cross-examination, Detective Kellett gave contradictory and conflicting testimony regarding the whereabouts of the contraband and other evidence. At various points, he testified that the alleged controlled substance and the shirt were in the police department's evidence locker, that he had forgotten to bring it to court, and that he did not have it.

The prosecution had never disclosed to the defendant that it intended not to produce that alleged cocaine at trial. However, on redirect examination of the detective, it was revealed for the first time that the Commonwealth had deliberately destroyed the evidence:

By Mr. Baldwin (prosecutor)

Q: You said the evidence, the cellophane bags, the ziplock baggies with the cocaine, they were destroyed? A: Yes.

By Mr. Spalding (defense counsel)

Objection. Move to strike. This is not. . .

The Court: Sidebar.

(Reproduced Record, R204a-205a).

At sidebar, defense counsel objected that the redirect testimony exceeded the scope of cross-examination and that permitting the detective to now testify that the evidence had been destroyed was unfairly prejudicial as he had not testified as such on direct. Defense counsel also pleaded surprise as no prior disclosure of destruction had been made by the Commonwealth. The trial court overruled the objections, refused to consider a motion for mistrial and permitted the prosecution to continue its questioning.

Later in the trial, the court asked the prosecuting attorney the following question which was not answered.

The Court: Let me ask you this. Was there a procedure followed when the destruction was made and, if so, what was the procedure.

(Reproduced Record, R289 a).

When defense counsel attempted to recross-examine the detective regarding the destruction of the evidence, it was revealed that he had personally done it without the permission of his

superiors and without notifying Department of Health officials. During re-cross examination the following exchange took place with Detective Kellett.

By Mr. Spalding (defense counsel)

Q: Do you have the document in your possession that shows when the cocaine was destroyed?

By Detective Kellet:

A: No. Not right here now.

(Reproduced Record, R299a).

* * *

Q: Okay. There has to be two witnesses present when something is destroyed, doesn't there? A: No.

Q: No? A: No. I do it.

Q: Do you have to get permission from someone to do it? A: No.

Q: Doesn't the law require that the District Attorney confiscate drugs? A: Not to my knowledge.

Q: It doesn't. It doesn't require that? A: No.

Mr. Baldwin (prosecutor)

Objection, your Honor.

The Court: Yes, the objection is sustained.

(Reproduced Record, R301a-302a).

* * *

Q: You took it upon yourself to destroy the evidence? A: The controlled substance, yes.

Q: You get permission from no one to do that? A: Correct.

Q: And you realized, of course, that in destroying that evidence.. . .

Mr. Baldwin: Objection, your Honor.

The Court: I'm going to sustain the objection. We are going into a legal area now Mr. Spalding. That's the end of the line of questioning. I'm referring to what the law is on this. I'm not going to get into that issue.

(R303a).

Defense counsel submitted to the trial judge a proposed point for charge to the jury that the finder of fact could infer that the failure to produce the alleged cocaine at trial would be against the interests of the prosecution. This requested point for charge was denied by the trial judge.

In his post-trial motions, David T. McCaw moved for arrest of

the judgment of guilty on the grounds that the prosecution had failed to produce the actual tangible evidence which served as the basis of the prosecution, that all the evidence had been destroyed and not made known to defendant until mid-trial, that the contraband had been destroyed in violation of state statutory procedures under 35 P.S. §§ 828 and 829 and that David T. McCaw had been denied the constitutional right to be confronted with the evidence against him. The trial court did not address the propriety of the destruction in its opinion, but acknowledged that the police had destroyed the evidence. On appeal, the Superior Court of Pennsylvania, held only that as Detective Kellett was a county detective in the employ of the District Attorney's office (as well as a Cumru Township Police Officer), he was empowered to destroy the cocaine. The Superior Court did not address whether or not the detective followed state procedure in the destruction of the evidence. Neither court addressed defendant's discovery request. The Superior Court opinion was affirmed by the Supreme Court of Pennsylvania without an opinion.

REASONS FOR GRANTING THE WRIT

I.

DAVID MCCAW'S CONFRONTATION AND DUE PROCESS RIGHTS WERE DENIED AS THE ALLEGED EVIDENCE WAS DESTROYED.

The destruction of all material evidence and failure to inform the defense of said destruction violated defendant's right of confrontation and his rights to due process of law under the federal Constitution.

During the entire pendency of this case, the defense was consistently misled regarding the existence of the material evidence in this matter. In discovery, the Commonwealth informed

the defendant that the evidence was in the possession of the police department. In reality, that information later proved to be false.

On May 15, 1990, the trial, from which this appeal was taken, was commenced. Immediately prior to the trial on that same day, the court elected to hear testimony and argument on defendant's previously filed pretrial motion. The Commonwealth continued to ignore or conceal the fact that all the material evidence in the case had been destroyed.

At the trial, the Commonwealth's witness gave contradictory and untrue testimony regarding the whereabouts of the alleged contraband and other evidence. Initially, he testified that the substance and shirt were in the police department's evidence locker, that he had forgotten to bring it to court, and that he did not have it as his explanation for its absence at trial. Upon being recalled to the witness stand, over objection, that same witness then claimed that he had destroyed the evidence himself without authorization from his superiors and not in accordance with normal procedure. He could not produce any documentation evidencing the destruction of evidence.

For over a period of seven months, from the date of counsel's appearance until well into trial, the prosecution withheld and concealed from the defense that the alleged cocaine, as well as the shirt in which it was claimed to be found, had been improperly destroyed.

The Commonwealth's duty to preserve and disclose material evidence is founded upon both constitutional and statutory grounds. *Brady v. Maryland*, 373 U.S. 83 (1963) mandates that the prosecution has an affirmative duty to disclose, and that a defendant's due process and confrontation rights will be violated when evidence material to guilt or punishment has been withheld in the context of a defense discovery request.

Among several errors, defendant initially assigned two (2) to the trial court with regard to the evidence introduced at trial. First, the trial court erred in failing to suppress a staged photograph of the alleged shirt and other prejudicial evidence allegedly seized by the police and then permitting their admission into evidence at trial. Second, the trial court erred when it permitted the Commonwealth to present evidence of cocaine possession when the alleged controlled substance had been previously improperly destroyed by Detective Kellett and concealed from the defense until after trial had started.

The rule of law set down in *Brady* states the suppression or destruction by the prosecution of evidence material to either guilt or punishment of the accused violates due process .

The alleged contraband in the instant case could not be produced by the Commonwealth because it had been previously destroyed by detective Kellett. This destruction was done by the detective alone. This fact was continuously concealed by the prosecution until a point in the trial when the Commonwealth attempted to "explain away" the absence of the cocaine through recalling Detective Kellett to the witness stand.

Brady announced the minimum due process requirements under the United States Constitution. The suppression by the prosecution of evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. The *Brady* decision eliminated the focus upon the good or bad faith of the prosecution and shifted the inquiries to the materiality of the destroyed evidence. An evaluation of the importance of the destroyed evidence must be made.

United States v. Agurs, 426 U.S. 97 (1976) defined materiality as:

> The proper standard of materiality must reflect our overriding concern with the justice of finding guilt beyond a reasonable doubt. It necessarily follows that if omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means the omission must be evaluated in the context of the entire record.

427 U.S. at 112.

In the case at bar, defendant was charged with possession of contraband. Said contraband was allegedly contained in the pocket of a shirt found in a heap of clothes on the floor of a building defendant leased to third parties. Without evidence of the alleged contraband there could be no crime. The Commonwealth did not even make an attempt to preserve a sample of the evidence so that subsequent testing could be performed on the substance. The distinguishing feature of this matter, that the substance was not cocaine or that it even existed in the first place, is incapable of being proven or disproven by any other means except the production of the evidence. The materiality of the destroyed evidence cannot be disputed. The destruction of all of the substance by the Commonwealth has completely prevented the defendant from demonstrating whether the alleged substance existed; was properly tested; the results accurately reported; or that the substance allegedly tested was the same substance which the Commonwealth claims it seized. Had the evidence, or any amount thereof, been preserved, and its chain of custody substantiated, there is a reasonable possibility that independent testing would have created a reasonable doubt on defendant's guilt.

The evidence destroyed was known to be material and critical, and not merely incidental, to the issue of defendant's guilt. Moreover, it is inherently impossible for defendant to prove the

exculpatory nature of this evidence because it no longer exists. Due process demands that a defendant be provided with a reasonable period of time within which to examine material physical evidence if a request for such evidence has been made and the Commonwealth intends to destroy same.

There is little doubt that the destroyed evidence was material to the guilt or innocence of David McCaw. If the destruction had not been concealed from defendant, the ability of appellant to defend against the charges would have been completely changed. Therefore, the decisions of the Pennsylvania courts to let stand a verdict which was based upon the admission of evidence that should not have been introduced is in direct conflict with the rule of law the United States Supreme Court set down in *Brady* and *Agurs*.

Accordingly, petitioner urges the Court to find that confrontation and due process rights were violated and that the conviction must be reversed.

II.

THE COMMONWEALTH'S CONDUCT CONSTITUTES BAD FAITH UNDER *ARIZONA V. YOUNGBLOOD*.

In *Brady v. Maryland, supra*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. In *United States v. Agurs, supra*, the Supreme Court held that the prosecution had a duty to disclose material evidence of guilt or punishment even though no requests had been made by the defense. It is the petitioner's position that the conduct of the Commonwealth meets the requirements of both *Brady* and *Agurs* as the prosecution failed to disclose the destruction of all of the alleged controlled substance as

well as the shirt. At no time did David McCaw have pretrial access to any part of the alleged cocaine or shirt.

However, if this Court should conclude *Arizona v. Youngblood*, 488 U.S. 51 (1988) controls, petitioner meets the test enunciated in this case to demonstrate a denial of due process.

In *Youngblood*, one item of critical evidence was not preserved by the police and a second item was destroyed. In distinguishing the facts from those found in *Brady*, and *Agurs*, it was found that the prosecution had made full disclosure of all evidence and destruction thereof to the defendant. The Court held that unless a defendant can show bad faith on the part of the police, the failure to preserve potentially useful evidence may not constitute a denial of due process.

In this case, there are at least two (2) factors which conclusively demonstrate the bad faith by the Commonwealth which have acted to deny David McCaw due process. First, it is undeniable that the detective was not following "normal procedure" established by Pennsylvania law, when he destroyed the evidence claimed to be seized at the crime scene and failed to turn it over to the Department of Health. The testimony revealed that the detective made unilateral decision to destroy all of the evidence which formed the crux of the prosecution's case. It was not an accident that he failed to preserve even a sample while it was in his custody. Detective Kellett failed to notify his superiors or even request their permission for the destruction. In addition, he did not display any knowledge of what the normal statutory practice might have been. There were no witnesses or records to substantiate the destruction.

In conjunction with the secret destruction, the Commonwealth actively concealed from the defendant the fact that the alleged cocaine, along with the alleged shirt, had been destroyed.

This is borne out by the fact the District Attorney never notified defense counsel that it intended to use a photograph instead of the tangible evidence itself. It was not until the detective, having once testified that he left the evidence in the evidence locker, was recalled and, over defense objection, testified that he had deliberately destroyed the evidence improperly. The defendant was forced to plead surprise because these continually changing facts were not revealed until mid-trial. The Commonwealth's conduct, following discovery requests and motions to suppress and to dismiss for a period of seven (7) months indicates, and creates the irrebuttable inference, that had the evidence been preserved it would have exonerated the defendant. The acts of continuing concealment and misrepresentation by the Commonwealth conclusively demonstrate bad faith by the prosecution under *Youngblood*, and shows disregard for the rights of the accused .

As a backdrop to the above events, the trial court refused to permit defense counsel the opportunity to inquire into the destruction of the evidence. As a result, it is still unknown how, when or where the evidence was destroyed, what the normal procedures were that the detective failed to follow and why a professional law enforcement officer, with many years of experience, was completely unknowledgable about the statute controlling evidence destruction. The destruction of the evidence, combined with a concealment orchestrated by the Commonwealth along with the trial court's refusal to permit full inquiry constitute not just overwhelming prejudice to the defendant but rather bad faith and a complete denial of due process warranting dismissal of the charges.

CONCLUSION

For all the foregoing reasons the petition should be granted.

Respectfully submitted,

ROBERT G. BAUER
ABRAHAM, PRESSMAN & BAUER, P.C.
Attorneys for Petitioner David T. McCaw
1818 Market Street, 35th Floor
Philadelphia, PA 19103
(215) 569-9990

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT DATED DECEMBER 1, 1992

SUPREME COURT OF PENNSYLVANIA
Middle District

Dec 1, 1992

William W. Spalding, Esq.
Roger S. Spalding, Esq.
1818 Market St., 35th Flr.
Philadelphia, PA 19103

Re: COMMONWEALTH OF PENNSYLVANIA

v. DAVID T. McCAW
No. 321 M.D. Allocatur 1991

Dear Petitioner:

This is to advise that the following Order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

"11/23/92
Petition Denied.
Per Curiam"

Sincerely yours,
s/ Shirley G. Phipps
PROTHONOTARY'S OFFICE
SUPREME COURT OF PENNSYLVANIA

Appendix A

c: Del Sole, Tamilia, Hoffman, JJ
Superior 1977PHL90
Smith, Calvin, J. Berks
Criminal 2372-88
George C. Yatron, Esq.

APPENDIX B — JUDGMENT AND OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED DECEMBER 9, 1991

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01977 PHILADELPHIA, 1990

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID T. MC CAW,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of BERKS County be, and the same is hereby AFFIRMED.

BY THE COURT:

s/ illegible
PROTHONOTARY

Dated: DECEMBER 9, 1991

Appendix B

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01977 PHILADELPHIA, 1990

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID T. MC CAW,

Appellant

Appeal from the Judgment of Sentence in the
Court of Common Pleas of Berks County,
Criminal Division, No. 2372-88

BEFORE: DEL SOLE, TAMILIA and HOFFMAN, JJ.

MEMORANDUM:

David T. McCaw takes this appeal from the judgment of sentence entered June 6, 1990 sentencing him to six (6) to twelve (12) months imprisonment after a jury found him guilty of one count of possession of a controlled substance.[1]

The facts as recited by the trial court follow.

> On the morning of August 26, 1988, a search warrant was executed on the premises of he Lincoln Park, Automotive building located at 114 Revere Boulevard, Lincoln Park, Cumru Township at approximately 9:30 A.M. The

---

1 35 P.S. § 780-113(a)(16).

> search was executed with respect to a private office exclusively used by defendant, in a place of business owned and controlled by the defendant as well. Once inside the office, the officers confiscated the following items of evidence which were used at trial: cocaine found in a shirt pocket with the name "Dave" on it which the defendant had worn earlier in the morning but had removed before going to the police station. Other items found in the shirt pocket included a straw, a wristwatch, and three pieces of paper, one of which was a billing from MCI which bore the defendant's name. A ziplock baggie of "green vegetable matter" was also found inside the shirt pocket. (N.T., p. 47.) Based upon this evidence, the Commonwealth obtained a conviction for one count of possession of cocaine against he defendant.

(Slip Op., Smith, J., 3/11/91, pp. 2-3.) On June 6, 1990, appellant's post-trial motions were denied[2] and he was sentenced. Appellant's motion for reconsideration was denied July 3, 1990 and this appeal followed.

Appellant raises seventeen alleged errors of law and

---

2 We note for the record that although appellant's post-trial motions were neither properly filed nor timely, the trial court nonetheless entertained the merits of the arguments. Accordingly, this Court will address those arguments preserved for appeal in the motion presented to the trial court for the first time on June 6, 1990, and uncertified copy of which is included in appellant's reproduced record. *See Kurtas v. Kurtas*, 521 Pa. 105, 555 A.2d 804 (1989); *see also Commonwealth v. Pirela*, 398 Pa. Super. 76, 580 A.2d 848 (1990).

discretion by the trial court, six of which are directly related to the confiscated shirt and its contents. Dealing with the issues in chronological fashion, however, we begin with the validity of the search warrant.[3]

In determining probable cause, Pennsylvania has adopted the totality of the circumstances test set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), and recently followed in *Commonwealth v. Karns*, 389 Pa. Super. 58, 566 A.2d 615 (1989), *allocatur denied*, __ Pa. __, 578 A.2d 927 (1990). *Karns* states it is the magistrate's task to determine, given all circumstances delineated in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, whether there is a fair probability evidence of a crime will be found at the place indicated. *Id.* It is this Court's duty to ensure the magistrate had a substantial basis for concluding probable cause existed. Affiant, Detective James P. Kellett, testified the informant, and admitted drug user, came to the police station of his own accord because he feared for his life at the hands of appellant and had, over the past year, on a weekly basis, personally observed bags of marijuana and cocaine at the appellant's place of business. The informant's credibility was bolstered by the facts he voluntarily surrendered approximately 22 grams of pure cocaine presently on his person, signed a search waiver allowing officers to throughly search his vehicle and permitted Officer Kellett to use his name on the application for the warrant. An informant is deemed reliable when he is a personal eyewitness to events

---

3 We note with disapproval appellant's failure to even marginally comply with Pa.R.A.P. 2116, Statement of Questions Involved, which mandates the statement contained in the brief not exceed one page. Further violations of this rule by counsel should be avoided.

narrated to police and makes statements against his penal interest. *Commonwealth v. Yacoubian*, 339 Pa. Super. 413, 489 A.2d 228 (1985). We find there was probable cause for the issuance of the search warrant for appellant's place of business. Consequently, appellant's argument the court committed reversible error in failing to suppress evidence seized as a result of the warrant is without merit.

Appellant's argument his confrontation rights were violated when the Commonwealth failed to notify him of the informant's whereabouts at trial or the fact it would not call informant as a witness will not be addressed by this Court as the issue was not preserved for appeal. *Hreha v. Benscoter* 381 Pa. Super. 556, 554 A.2d 525 (1989).

The next six issues to be addressed are related to the alleged destruction of the evidence seized pursuant to the search warrant. As stated supra, a work shirt with the emblem "Dave," and containing in its pocket, *inter alia*, with powder suspected to be a controlled substance, were seized from appellant's place of business on August 26, 1988. When the powder field tested positive for cocaine, Officer Kellett testified he personally packaged and transported it to the Bethlehem State Police Crime Lab for chemical and qualative analysis. According to procedure, he logged in the substance under an assigned log number and the powder was then analyzed by Paul T. Skrimcovsky, a Pennsylvania State Police Forensic Scientist. Skrimcovsky testified the substance seized from appellant's place of business was six and one-half grams of 98 per cent pure cocaine. After preparing his written report confirming the substance was cocaine, Skrimcovsky turned over the cocaine to Detective Kellett who, in turn, returned it to the police station on September 30, 1988.

Appendix B

The standard for establishing a chain of custody for the admission of physical evidence is abuse of discretion and the officer need only establish a reasonable inference the identity and condition of the exhibit remained unimpaired during the period in which it changed hands. *Commonwealth v. Hudson*, 489 Pa. 620, 414 A.2d 1381 (1980); *Commonwealth v. Bartley*, 395 Pa. Super. 137, 576 A.2d 1082 (1990). We find the testimony of Detective Kellett and Officer Skrimcovsky was sufficient to establish a reasonable inference the identity and condition of the cocaine remained unimpaired. Appellant's argument the Commonwealth failed to establish an unbroken chain of custody is without merit.

Next, appellant argues the court committed reversible error by failing to order a new trial due to the destruction of appellant's shirt. The record reveals the shirt confiscated by the officers was returned to the appellant on January 27, 1989. Therefore, we dispense with appellant's argument to the contrary without further comment.

Appellant also contends the destruction of the cocaine prior to trial, in violation of 35 P.S. § 829, Disposition of confiscated drugs, and the trial court's failure to fashion a remedy for the alleged violation under Pa.R.Crim.P. 305 E, Remedy, violated his constitutional rights to confrontation and due process and constitute reversible error.

Appellant was initially arrested on August 26, 1988. On January 11, 1989, appellant was accepted into the Accelerated Rehabilitative Disposition Program (ARD) for a period of twelve months. Because it was not anticipated the case would go to trial, the shirt and all personal belongings were returned to appellant on January 27, 1989, and the cocaine was destroyed by Detective Kellett on February 28, 1989. On November 20, 1989, however,

when it was determined appellant had failed to live up to the terms of the ARD agreement, appellant was taken off ARD and the charges pending against appellant were reinstated.

As stated above appellant contends section 829, *supra,* was violated by Officer Kellett when he arbitrarily destroyed the cocaine prior to trial. Appellant's argument pivots on the allegation only the district attorney has the power to dispose of controlled substances. It was stated, however, Detective Kellett is a county detective employed by the district attorney's office as well as the Cumru Township Police Department. Accordingly, appellant's argument is without merit. Additionally, appellant suffered no prejudice as a result of Kellett's actions. The cocaine was available for independent testing by appellant from the time of his arrest until it was destroyed six months later, and appellant and/or his counsel chose not to examine the substance for authenticity. Although arguably Kellett's action in destroying the cocaine was not prudent, the Commonwealth was under no obligation to physically produce the confiscated cocaine at trial. The Commonwealth relied on the testimony of their expert, Paul Skrimcovsky, a forensic scientist with the Pennsylvania State Police, who stated he tested the substance found in appellant's shirt pocket and positively identified it as six and one-half grams of pure cocaine. The decision whether to believe the Commonwealth's evidence then properly rested with the jury. *Commonwealth v. Gonzalez,* 325 Pa. Super. 371, 47 A.2d 1389 (1984).

We find appellant suffered no prejudice by the destruction of the cocaine nor were his constitutional rights violated. Indeed, this Court finds it unlikely appellant would agree to ARD had he seriously contested the authenticity of the cocaine found in his shirt. Because we find there was no violation of section 829, it follows appellant's argument the court erred by not fashioning relief under Pa.R.Crim.P. 305 E is equally without merit.

Appendix B

Appellant's last argument regarding the confiscated shirt contends appellant would have been exonerated had the evidence (shirt and cocaine) been preserved. Specifically, appellant argues "the destruction of the evidence, combined with a concealment orchestrated by the Commonwealth along with the trial court's refusal to permit full inquiry constitute not just overwhelming prejudice to the defendant but rather bad faith and a complete denial of due process warranting dismissal of the charges." (Appellant's brief at p. 27.) In light of the above discussion we find this argument devoid of merit.

Appellant next argues the court abused its discretion by admitting into evidence a photograph of the shirt and cocaine and allowing it to go out with the jury during its deliberations. Appellant argues the picture was hearsay, not the best evidence and not a sufficient substitute for the actual physical evidence.

Photographs are admissible if they are both relevant and competent. *Commonwealth v. Faraci,* 319 Pa. Super. 416, 466 A.2d 228 (1983). The admissibility of photographs is within the discretion of the trial court and its decision will not be overturned absent an abuse of discretion. *Commonwealth v. Carter,* 377 Pa. Super. 93, 546 A.2d 1173 (1988), *appeal denied,* 523 Pa. 630, 564 A.2d 1259 (1989). Detective Kellett testified he took the photograph of the confiscated evidence on September 2, 1988, one week after appellant's arrest, and then personally delivered the film to a one-hour processing shop. The court found, under the circumstances of this case involving an ARD violation and subsequent reinstatement of criminal charges, secondary evidence was appropriate. Appellant suffered no prejudice by the admission into evidence of the photograph. We find there was no abuse of discretion by the trial court.

Appendix B

Trial error was also allegedly committed when the Commonwealth was allowed to present rebuttal character evidence. The testimony in question was offered by Detective Lawrence Palmer of the Berks County Narcotics Information Center, acquainted with appellant for ten years, who testified as to appellant's poor reputation in the community. This testimony was offered to contradict evidence of good character placed at issue by the defense. Once a defendant has presented evidence to prove his good character or reputation, the Commonwealth is properly permitted to thereafter rebut such evidence. *Commonwealth v. Trignani*, 334 Pa. Super. 526, 483 A.2d 862 (1983). The admissibility of evidence is a matter left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Commonwealth v. Patterson*, 392 Pa. Super. 331, 572 A.2d 1258 (1990). We find the trial court did not abuse its discretion in allowing the rebuttal testimony of Detective Palmer.

Keeping in mind the abuse of discretion standard for the admissibility of evidence we address appellant's argument the court erred by allowing Detective Kellett to retake the stand to resolve the question as to why the Commonwealth was using a photo of the confiscated evidence as opposed to the actual evidence. We find appellant was not unduly prejudiced by the court's decision allowing Officer Kellett to testify in order to clear up inconsistencies surrounding the whereabouts of the evidence. There was no abuse of discretion.

Appellant's next four arguments concern the jury instructions. Appellant argues the court committed reversible error when it refused to give the following standard jury instructions: PaSSJI (Crim) 3.07, Defendant's Character (Reputation), Cross-Examination of Character Witness; PaSSJI (Crim) 3.21A, Failure to Call Potential Witness; and PaSSJI (Crim) 3.21B, Failure to Produce Document or Other Tangible Evidence at Trial. Appellant

also contends the court erred by failing to instruct concerning missing witnesses (PaSSJI (Crim) 3.21)[4] and regarding 35 P.S. § 828, Confiscation of drugs offered in evidence, and section 829, *supra*, which deal with the confiscation and subsequent disposition of drugs.

A trial court is not required to accept the jury instructions requested by counsel. *Commonwealth v. Kyle*, 367 Pa. Super. 484, 533 A.2d 120 (1987). In determining whether the trial judge committed an abuse of discretion or error of law regarding jury instructions, we consider the charge as a whole in light of the evidence presented. *Papandrea v. Hartman*, 352 Pa. Super. 163, 507 A.2d 822 (1986). If error is found to have been committed, a new trial is warranted only where such error has been clearly prejudicial to the appellant. *Commonwealth v. Tharp*, 373 Pa. Super. 285, 541 A.2d 14 (1988).

The court found PaSSJI (Crim) 3.07, *supra*, inapplicable and modified the charge to more accurately reflect the specifics of the testimony under consideration and the current state of the law. The court was within its discretion to modify the jury instructions as it deemed proper and our review of the record indicates the court acted properly.

Appellant also argues the Commonwealth's failure to produce informant Randy Fisher at trial warranted instructions by the court

---

4 We question counsel's request for a standard jury instruction which was withdrawn from suggested usage in January 1981. Even the note made on the original "Defendant's Points for Charge" contained in the record states "denied not on PSI" (presumably, meaning Pennsylvania Standard Instructions. Because the trial judge carefully considered counsel's request, we have reviewed and now accept the trial judge's reasons for not giving such a charge (N. T. Vol. III, pp. 448-450).

concerning missing witnesses and failure to call a potential witness. In denying appellant's points for charge, the court reasoned Fisher was not missing and was equally available to the defense had appellant wished to subpoena him to testify. We agree with this reasoning and find appellant's argument without merit.[5]

With regard to the instruction on the Commonwealth's failure to produce tangible evidence, as stated above, the Commonwealth produced a property receipt signed by appellant indicating all personal items had been claimed by him and a photograph of the evidence was presented at trial. Although the cocaine was destroyed by the Commonwealth, expert testimony was offered substantiating the Commonwealth's averment the confiscated powder was indeed pure cocaine. The Commonwealth was under no absolute obligation to produce the actual evidence, and satisfactorily accounted for its absence. Appellant suffered no prejudice. The facts of this case are, therefore, clearly distinguishable from those in the case relied upon by appellant. *Commonwealth v. Chapman,* 244 Pa. Super. 265, 386 A.2d 994 (1978). The instruction was properly denied.

Appellants next alleges error in the court's refusal to instruct the jury regarding the Commonwealth's alleged failure to comply with the statute addressing disposal of confiscated drugs, and the court's failure to fashion an appropriate remedy.[6] In its discretion,

---

5 At the time of trial these suggested points for charge were requested and denied as to Officer Steve Dougherty and Randy Fisher; the denial as to Dougherty was not pursued on appeal.

6 Although appellant's points for charge did not request instruction on this issue, and the issue on appeal is arguably waived, the transcript indicates there was some discussion on the matter in the interest of judicial economy we address the issue.

the court denied any instruction reasoning the Commonwealth's alleged failure to dispose of the drug within the parameters of the statute had nothing to do with the case at bar. Having previously stated there was no violation of 35 P.S. §§ 828, 829, we agree and find appellant's argument devoid of merit.

Appellant next argues there was insufficient evidence to support a finding he had constructive possession of the alleged cocaine. At this issue was not raised in appellant's post-trial motions or his statement of matters complained of on appeal, it will not be addressed by this Court. *See Hreha, supra.*

Last, appellant contends the court committed reversible error when it allegedly failed to consider the sentencing guidelines and imposed an excessive sentence.[7]

It is well-established sentencing is a matter within the sound discretion of the trial court and will not be disturbed unless it is outside the statutory limits or manifestly excessive so as to inflict too severe a punishment. *Commonwealth v. Gee*, 394 Pa. Super. 277, 575 A.2d 628 (1990). Although a sentencing court is not required to follow the guidelines, the court must demonstrate it was aware of and considered them. *Commonwealth v. Vinson*, 361 Pa. Super. 526, 522 A.2d 1155 (1987).

Appellant was convicted on one count of possession and,

---

7 McCaw has challenged the discretionary aspects of his sentence without complying with Pa.R.A.P. 2119(f), requiring a concise statement of reasons relied upon for allowance of appeal with respect to the discretionary aspects of his sentence be set forth in his brief immediately preceding the argument. However, because the Commonwealth has failed to object to the omission, the requirement is waived and this Court will address the merits of appellant's argument. *See Commonwealth v. Zelinski*, 392 Pa. Super. 489, 573 A.2d 569 (1990).

according to testimony at the sentencing hearing, had a prior record score of zero. An individual convicted of possession under 35 P.S. § 780-113(a)(16) shall "be sentenced to imprisonment not exceeding one year or to pay a find not exceeding five thousand dollars ($5,000), or both. . . ." 35 P.S. § 780-113(37)(b). Looking to the sentencing guidelines, drug offenses with a minimum sentence ceiling of six months[8] are given an offense gravity score of M which, under the standard range, translates into a statutory minimum sentencing range of zero to six months. 42 Pa.C.S. § 9721, Sentencing generally. Therefore, the court's sentence of six to twelve months imprisonment and a $5,000 fine was within its discretion.

Also, in light of the fact a presentence investigation existed and was reviewed by the sentencing judge, and the sentence imposed was in the standard range, the court is under no obligation to file a separate statement and it will be presumed the court utilized the information contained in the report and weighed those considerations along with mitigating statutory factors. *Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988). Nevertheless, the court did state its reasons for imposing the sentence in its Opinion averring the appellant exhibited no remorse, failed to cooperate with law enforcement officials and lost the benefit of his second chance by violating his ARD agreement. Appellant's sentence was neither excessive nor beyond the statutory limits.

Our sedulous review of the record indicates appellant's arguments are all without merit. Therefore, based on the foregoing

---

8 Statutory limit is defined as the longest maximum sentence provided by law. Because the maximum allowable sentence is one year, the maximum minimum sentence cannot be more than six months.

reasons of law and fact, we affirm the judgment of sentence entered June 6, 1990.

Judgment of sentence affirmed.

APPENDIX C — MEMORANDUM OPINION OF THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA CRIMINAL DIVISION

IN THE COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

No. 2372/88

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID T. McCAW,

Defendant

Mark C. Baldwin, Esquire, Assistant District Attorney for the Commonwealth.
William W. Spalding, Esquire, Attorney for the defendant.

MEMORANDUM OPINION, Calvin E. Smith, J March 11, 1991.

On May 18, 1990, the defendant, David T. McCaw, was found guilty by a jury on the single count of possession of a controlled substance (cocaine).[1] Defendant now appeals both the verdict and the sentencing alleging several errors. Those matters complained of on appeal are as follows:

1. There existed no probable cause to support the issuance of the search warrant.

---

1 35 Pa.C.S.A. § 780-113(a)(16) (1990).

Appendix C

2. The evidence was insufficient to support a guilty verdict when the alleged controlled substance was not produced in court.

3. The destruction of the contraband precluded the defendant from analyzing it. The court erred in not dismissing the charge when the defendant was denied this opportunity.

4. The Commonwealth produced only "secondary evidence" which would not support a guilty verdict and failed to establish an unbroken chain of custody as to the alleged contraband.

5. The testimony offered on behalf of the Commonwealth was so conflicting and contradictory that it would not support a verdict of guilty beyond a reasonable doubt.

6. The rebuttal character testimony offered by the Commonwealth was without proper foundation, leading and prejudicial.

7. The court committed reversible error in failing to grant defendant's motion for suppression.

8. The court committed reversible error in failing to grant a mistrial and by unreasonably restricting the closing argument of defense counsel.

9. The court committed reversible error in denying defendant's proposed points of charge to the jury.

10. The court erred in failing to grant defendant's motion for arrest of judgment and/or new trial.

11. The sentence imposed by the court was excessive and not

supported by the record.

Our discussion begins with a brief recitation of the facts. On the morning of August 26, 1988, a search warrant was executed on the premises of the Lincoln Park Automotive building located at 114 Revere Boulevard, Lincoln Park, Cumru Township at approximately 9:30 A.M. The search was executed with respect to a private office exclusively used by defendant, in a place of business owned and controlled by the defendant as well. Once inside the office, the officers confiscated the following items of evidence which were used at trial: cocaine found in a shirt pocket with the name "Dave" on it which the defendant had worn earlier in the morning but had removed before going to the police station. Other items found in the shirt pocket included a straw, a wristwatch, and three pieces of paper, one of which was a billing from MCI which bore the defendant's name. A ziplock baggie of "green vegetable matter" was also found inside the shirt pocket. (N.T., p. 47.) Based upon this evidence, the Commonwealth obtained a conviction for one count of possession of cocaine against the defendant.

Defendant first contends there was no probable cause to support the search warrant. Probable cause for issuance of a search warrant exists when the facts and circumstances set forth in the affidavit are sufficient to warrant a man of reasonable caution in the belief that contraband to be seized is in a specified place. *Commonwealth v. Macolino,* 336 Pa. Super. 386, 485 A.2d 1134, 1136 (1984). In the instant case, Detective Kellet of the Cumru Township police Department testified at the suppression hearing that the information contained in the affidavit was obtained from Randall Fisher, a man who had personal contact with the defendant on a weekly basis spanning at least 52 weeks prior to August 26, 1988. This contract occurred at the defendant's place of business

and while there Fisher told police he personally witnessed various types of controlled substance, i.e. marijuana and cocaine. Fisher admitted to being a drug user and stated he was very familiar with cocaine and marijuana. This assertion was buttressed by the fact that at the time Fisher had in his possession 22 grams of pure cocaine. An informant is deemed reliable when he is a personal eyewitness to events narrated to police and makes statements against his penal interest. *Commonwealth v. Yacoubian*, 339 Pa. Super. 413, 489 A.2d 228, 233 (1985). Furthermore, Fisher's motivation for coming to the police in the first place was based upon his receiving a death threat from McCaw, which he believed put his life in immediate danger. Fisher's physical state at the time he initially came to the police, i.e., hypernervous and heavily perspiring, only added to his credibility that he was a man genuinely concerned for his life. Based upon the above facts and applicable law there existed sufficient probable cause to issue the search warrant.

Defendant's second and third contentions center around the Commonwealth's inability to produce the contraband in court. This is so because the police had destroyed the cocaine prior to this case coming to trial. The explanation as to why can be found in background of the case. Mr. McCaw was originally arrested for this offense on August 26, 1988. After a short period of pretrial discovery, the defendant was accepted into the Accelerated Rehabilitation Disposition [hereinafter ARD] program. Mr. McCaw failed to live up to the terms of this program and was taken off ARD on November 20, 1989. However, prior to his termination from ARD Mr. McCaw signed a property/inventory receipt reclaiming his personal items seized by the police at the scene of the crime. Those items returned to Mr. McCaw included a shirt which contained the cocaine, a wristwatch, a straw, and the three pieces of paper found inside the shirt pocket. (N.T., p. 205.) The

cocaine was not returned to Mr. McCaw. Additionally, neither one of Mr. McCaw's two previous attorneys had requested the cocaine be examined for authenticity. Rather than store the cocaine indefinitely, the police had it destroyed but not before getting it properly authenticated themselves by an expert. At trial, the Commonwealth produced Mr. Paul T. Skrimcovsky, employed by the Pennsylvania State Police as a forensic scientist, and considered an acknowledged expert on illegal substances. Mr. Skrimcovsky testified that the evidence Detective Kellet furnished him, the white substance found inside the shirt pocket of David McCaw, was chemically analyzed at the State Police laboratory and was positively identified as six and a half grams of pure cocaine. In lieu of the absence of physical evidence, the testimony of Mr. Skrimcovsky is sufficient to corroborate that the substance seized from defendant's shirt pocket was indeed cocaine.

Defendant next contends the Commonwealth produced only "secondary evidence" which would not support a guilty verdict and also failed to establish an unbroken chain of custody as to the alleged contraband. Once again, the "secondary evidence" defendant alludes to has to do with the fact that the actual cocaine seized by police was not produced at trial.[2] In light of our above discussion, we deem this argument without merit as well. The defendant's chain of custody argument is equally devoid of merit. There are no special rules with respect to authenticity or "chain of custody". All that is required is that the exhibit remained unaltered or untainted during period in which it changed hands. *Stahl v. Pennsylvania Board of Probation and Parole,* 106 Pa. Commonwealth 274, 525 A.2d 1272, 1274 (1987). The testimony at trial established that the evidence was delivered to the forensic scientist in a sealed container by Detective Kellet. After tests were

---

2 Notes of post-trial argument and sentence, pp. 14-20, June 6, 1990.

run, Detective Kellet returned to the lab center and personally picked up the evidence, which was resealed and brought back to the police station. (N.T., p. 123.) Given these facts, the chain of custody standard was satisfactorily met by the Commonwealth.

Defendant next contends the testimony offered on behalf of the Commonwealth was so conflicting and contradictory that it would not support a verdict of guilty beyond a reasonable doubt. By raising this objection, the defendant unnecessarily intrudes upon the province of the jury. It is well established in law that the question of credibility is left to the jury and the verdict will not be disturbed if the jury determines the evidence is worthy of belief. *Commonwealth v. Gonzalez,* 325 Pa. Super. 371, 472 A.2d 1389, 1390 (1984). Obviously, the jury in the instant case regarded the Commonwealth's testimony as credible. Furthermore, inconsistencies in testimony presented will not render a verdict invalid. The mere existence of a conflict in the evidence does not mean the trier of fact was required to resort to speculation. *Id.*, 472 A.2d at 1390. Despite the inconsistent testimony on behalf of some of the witnesses, the evidence was sufficient in the case at bar to find the defendant guilty of the crime charged beyond a reasonable doubt.

Defendant next contends that the rebuttal character testimony offered by the Commonwealth was without proper foundation, leading and prejudicial. The Commonwealth has a right to cross-examine character witnesses and to discredit evidence of good character through defendant's general reputation. *Commonwealth v. Luther,* 317 Pa. Super. 41, 463 A.2d 1073, 1080 (1983). In the instant case, the Commonwealth called Detective Palmer, a Berks County detective, to the stand to rebut the character evidence offered by defendant. Palmer testified that he had known defendant for ten years in the community in which he lived and that generally

he did not have a good reputation. (N.T., p. 357.) That was the extent of the Commonwealth rebuttal. It was not leading or prejudicial. Further, a proper foundation was laid by the detective when he stated he had known defendant for ten years.

Defendant next contends the court erred in failing to grant his motion for suppression of evidence. A denial for motion to suppress will not be disturbed if it is determined the record supports the lower court's factual findings and the inferences and legal conclusions drawn from them. *Commonwealth v. Blassingale*, __ Pa. Super. __, 581 A.2d 183, 188 (1990). At the suppression hearing, it was determined that adequate probable cause existed, the informant was credible, the ensuing affidavit of probable cause was properly executed and the evidence was not unlawfully seized. There is no reason to go back over the probable cause argument. It is sufficient to say here that the testimony presented has clearly supported the legal conclusions drawn from the facts when construed in a light most favorable to the Commonwealth.

Defendant next contends the court committed reversible error in failing to grant a mistrial and by unreasonably restricting the closing argument of counsel. A decision whether to declare a mistrial is within the discretion of the trial court and its decision will not be reversed absent flagrant abuse of discretion. *Commonwealth v. Farnell*, 333 Pa. Super. 256, 482 A.2d 271, 273 (1985), *Commonwealth v. Wissler*, 322 Pa. Super. 407, 469 A.2d 686, 687 (1983). There was no abuse of discretion in the instant case. The defendant in post-trial argument moved for a mistrial on behalf of the Commonwealth because a sequestration order of *defendant's* witness was violated. In addition, the violation was committed by the defendant under deliberate, inexcusable and prejudicial circumstances. The Commonwealth was satisfied with

the evidence and declined defendant's invitation for a mistrial. (N.T. pp. 441-444). Hence, we consider the issue no further except to say that the defendant was given a fair and impartial trial. Defendant's closing argument was not unduly restricted when the defendant argued about irrelevant topics and misstated the facts. (N.T., pp. 400-402.) The judge exercised his rightful discretion by curtailing this conduct and advising the attorney to stick to the real issues of the case.

Defendant next contends the court committed reversible error in denying defendant's proposed points of charge for the jury. A trial court is not required to accept the jury instructions given by counsel. *Commonwealth v. Kyle*, 367 Pa. Super. 484, 533 A.2d 120, 133 (1987). When counsel submitted his points of charge the court stated they were either irrelevant or already covered. The charge given by the court fully and adequately explained the relevant legal principles when applied to the evidence presented at trial. We find no prejudicial value to defendant in dismissing his proposed points of charge for the jury. Moreover, the trial court is free to select its own expression in charging the jury. *Commonwealth v. Alvin*, 357 Pa. Super. 509, 516 A.2d 376, 381 (1986).

Defendant next contends the court erred in failing to grant defendant's motion for arrest of judgment and/or new trial. Whether the verdict is contrary to the weight of the evidence, thereby requiring a new trial, is generally within the sound discretion of the trial court. *Commonwealth v. Sample*, 321 Pa. Super. 457, 468 A.2d 799, 803 (1983). If the jury's finding is supported by the record, trial court's denial of a notice for new trial will not be disturbed absent an abuse of discretion. *Id.*, 468 A.2d at 803 (1983). Applying this standard, it is clear the jury's finding is supported by the record. The Commonwealth introduced evidence that the defendant was in control of the room where this shirt was found, that the defendant was wearing the shirt earlier in the day

but had removed it after being confronted by police officers at his place of business. The shirt remained untouched in this room until the police officers executed the search warrant and found inside the shirt pocket a packet of cocaine. Based upon the foregoing evidence, defendant's conviction is supported by the record.

Finally, defendant contends the sentence imposed by the court was excessive and not supported by the record. Sentencing is a matter within the sound discretion of lower court and will only be disturbed when it exceeds statutory prescribed limits or is so manifestly excessive as to constitute too severe a punishment. *Commonwealth v. Bailey,* 368 Pa. Super. 618 534 A.2d 829, 832 (1987), appeal denied, 518 Pa. 635, 542 A.2d 1364 (1987). Defendant's sentencing was based upon a number of factors. First, there is a serious drug problem in our city. Throughout trial and during post-trial motions defendant showed no remorse and was very uncooperative with law enforcement officials. At no time did the defendant attempt to or provide law enforcement officials with any information pertaining to the drug culture here in Reading. The court cited these reasons on the record in support of his sentencing.[3] Furthermore, it was not lost on the court that the defendant, originally on ARD, lost the benefit of his "second chance" by committing a summary offense while involved with the program and was subsequently removed. Given the nature of the crime and the obstinate behavior of the defendant, sentencing imposed upon the defendant in the immediate case is justified.

For all the reasons discussed above, we REAFFIRM our prior order denying defendant's post-verdict motions and respectfully urge that his appeal be denied.

---

3 Notes of post-trial argument and sentence, pp. 47-50, June 6, 1990.

Appendix C

BY THE COURT:

s/ Calvin E. Smith
CALVIN E. SMITH, J.